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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-754

UNITED STATES OF AMERICA,
Petitioner,

v.

ROY MANDUJANO
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT	13
I. A GRAND JURY SETTING IS INHERENTLY COERCIVE AS IT IS A PART OF THE INVESTIGATING PROCESS AND INTELLIGENCE SYSTEM OF THE GOVERNMENT	13
II. MANDUJANO WAS A "PUTATIVE DEFENDANT" PRIOR TO HIS APPEARANCE BEFORE THE GRAND JURY OR DURING THE QUESTIONING BEFORE THE GRAND JURY WHEN THE QUESTIONING BECAME SPECIFIC AS TO KNOWN PRIOR ACTS OF MISCONDUCT	23
III. THAT MANDUJANO AS A "PUTATIVE DEFENDANT" MUST BE AFFORDED MIRANDA WARNINGS	30
IV. CAN A "PUTATIVE DEFENDANT" WHO IS NOT GIVEN MIRANDA WARNINGS, COMMIT PERJURY WITH IMPUNITY?	34
CONCLUSION	38
AFFIDAVIT OF SERVICE	39

TABLE OF AUTHORITIES

Cases:

Betts v. Brady, 316 U.S. 455	12, 37
Brown v. Mississippi, 297 U.S. 278	36
Brown v. Walker, 161 U.S. 591	30

	Page
Bryson v. United States, 396 U.S. 64	34
Bumper v. State of North Carolina, 88 S.Ct. 1788	22
Cicenia v. Lagay, 357 U.S. 504	36
Counselman v. Hitchcock, 142 U.S. 547 (1892)	30
Escobedo v. Illinois, 378 U.S. 478 (1964)	30
Gallegos v. Colorado, 370 U.S. 49	36
Glickstein v. United States, 222 U.S. 139	34
Halt v. Henkel, 201 U.S. 43	30
Harris v. New York, 401 U.S. 222	34
Hoffman v. United States, 341 U.S. 479	30
In Re Groban, 352 U.S. 330, 346-347	15
In Re Kelly, 350 F.Supp. 1198	29
Johnson v. Zerbst, 304 U.S. 458	18
Kastigan v. United States, 406 U.S. 441 (1972)	30
Kinsella v. United States, 361 U.S. 234	37
Kirby v. Illinois, 406 U.S. 682, 689	21
Lawn v. United States, 115 F.Supp. 674	32
Lefkowitz v. Turley, 414 U.S. 70	30
Mattox v. Carson, 424 F.2d 202	16
Miranda v. Arizona, 384 U.S. 436 (1966)	*passim*
Murphy v. Waterfront Commission, 378 U.S. 52	32, 35
Rogers v. United States, 340 U.S. 367	30-31
Schneckloth v. Bustamonte, 412 U.S. 218, 226-227	16, 35, 38
United States v. Calandra, 414 U.S. 338, 343	15
United States v. Digrazia, 213 F.Supp. 232	32
United States v. Fruchtman, 202 F.Supp. 534, 536	25, 32
United States v. Jones, 342 F.2d 863	31
United States v. Knox, 396 U.S. 77	35

	Page
United States v. Lardieri, 497 F.2d 317	25
United States v. Luxenberg, 374 F.2d 241	32
United States v. Mandujano, 499 F.2d 370 (C.A. 5 1974, Certiorari Denied, S.Ct. No. 74-5441, January 13, 1975)	27
United States v. Monia, 317 U.S. 424 (1943)	30
United States v. Murdock, 284 U.S. 141, 148	30
United States v. Phillips, 443 F.2d 246 (C.A. 5)	13
United States v. Rangel, 496 F.2d 1059	31, 32
Watts v. Indiana, 338 U.S. 49	36
Miscellaneous, Constitution, Statutes:	
Constitution of the United States:	
Fourth Amendment	
Fifth Amendment	*passim*
Sixth Amendment	2
18 U.S.C. 1623	2
American Bar Association Project on Standards Relating to the Prosecution Function, Approved Draft 1971, Section 3.6 (d), p. 32	32-33
Katz: Criminal Procedure – Grand Juries – Lack of Miranda Warnings for Virtual Defendant Results in Suppression of Perjurious Testimony, Vol. 53, No. 1, *Texas Law Review* (1974)	

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether a grand jury setting is inherently coercive.

2. Whether a "putative defendant" must be given *Miranda* warnings prior to his testimony before a grand jury when the interrogation focuses on specific acts of misconduct, which acts the government has investigated.

3. Whether a "putative defendant" who is not given *Miranda* warnings can commit perjury with impunity.

4. Whether suppression of the alleged perjurious grand jury testimony is the proper remedy when the witness has been denied "due process."

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person – shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law–.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

2. 18 U.S.C. provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration – shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

1. On the 29th day of March, 1973, Alfonso Cavalier, an officer with the San Antonio, Texas, Police Department assigned to the Office of Drug Abuse Law

Enforcement (App. 47), went to the Tally-Ho Lounge that was owned by respondent (App. 48). Agent Cavalier went there at approximately 1:30 in the afternoon on March 29, 1973, for the purpose of possibly making a buy of heroin from respondent (App. 48). After being with respondent some two hours, respondent allegedly made several phone calls trying to contact someone who had heroin (App. 49-50). After being unable to contact anyone, respondent allegedly requested Cavalier to give him $650 to purchase the heroin (App. 49). Respondent allegedly took the $650 and left the Tally-Ho Lounge about 3:25 P.M. (App. 49) and returned around 4:30 P.M. on that same day (App. 49). Cavalier then said that Mandujano was unable to contact the contact man to secure any heroin and returned the money to him (App. 49). Cavalier then left the bar and then aborted the entire operation later that day. Some seventy-seven days later, Agent Cavalier prepared a written report as he was informed that the government was going to try and charge Mandujano with perjury before the grand jury and they wanted some facts on the actual case (App. 51). The report that Cavalier prepared was signed June 4, 1973. Thus, some four months passed between the date of the alleged attempt of distribution of one ounce of heroin to the signing of the report.

Cavalier allegedly informed the special prosecutor, Luckel, that Mandujano had quite a bit of intelligence about narcotic traffic and trafficking in San Antonio, Texas (App. 52). The prosecutor then believed that Mandujano had several potential sources allegedly whom Mandujano could contact to obtain heroin (App. 45). Thus, the special prosecutor subpoenaed Mandujano to

appear before the grand jury, and the purpose of asking him the questions to which the prosecutor knew the answers was to gauge the truthfulness of Mandujano's testimony (App. 45).

2. Mandujano was compelled by subpoena to appear before the grand jury on May 2, 1973 (App. 2). Mandujano had received the subpoena about a week before he was forced to appear. The special prosecutor, Luckel, told Mandujano that he was a special attorney employed by the Department of Justice and the other people present were members of a special federal grand jury investigating violations of narcotics and firearms (App. 5). In this setting which the prosecutor placed out of perspective, Mandujano was told the following:

> "Q. Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> "A. Do I answer all the questions you ask?
>
> "Q. You have to answer all the questions except for those you feel will incriminate you in the commission of a crime. Is that clear?
>
> "A. Yes, sir.
>
> "Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And of course, if you do not answer truthfully, in other words, if you lie about certain questions you could possibly be charged with perjury. Do you understand that?
>
> "A. Yes, sir.
>
> "Q. Have you contacted a lawyer in this matter?
>
> "A. No, sir, I haven't.

> "Q. I take that to mean then that you do not wish the services of a lawyer here today?
>
> "A. I don't have one. I don't have the money to get one.
>
> "Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside . . . (App. 5-6)"

After the special prosecutor administered the above to Mandujano, the prosecutor then asked background information of Mandujano. Then the prosecutor asked specifically of Mandujano whether he had discussed the sale of heroin with anyone during the past year and if anyone had ever asked to buy one ounce from him (App. 15-16). Mandujano denied it (App. 16). The prosecutor asked, "Are you sure of that?" To which Mandujano replied, "Yes." (App. 16). The prosecutor later asked Mandujano whether he was sure whether Mandujano discussed selling heroin last year to which Mandujano said, "No." (App. 20). The prosecutor asked Mandujano whether he was ever given any money to buy heroin and if he had $650 could Mandujano buy one ounce of heroin, to which Mandujano said, "No." (App. 20). The prosecutor stated that the only reason he had asked these questions to which he knew the answers and which were based upon the substantive crime, was to gauge the truthfulness of Mandujano's testimony (App. 45-46). The prosecutor asked about others who sell or were involved in narcotics (App. 18-19) and about possession of a gun (App. 21). Nowhere else is there a discussion about what the grand jury was convened to investigate (App. 5).

3. The special prosecutor then indicted Mandujano on June 13, 1973, on two counts: Count One,

attempted distribution of one ounce of heroin in violation of 21 U.S.C. 846(a) (App. 36); and Count Two, perjury in violation of 18 U.S.C. 1623 (App. 2-4). But before Mandujano was indicted, the special prosecutor had Agent Cavalier, the only government witness, prepare a written statement which was prepared on June 4, 1973 (App. 51).

4. Prior to trial, Mandujano moved to suppress his grand jury testimony (App. 23-25). After evidentiary hearings, the district court granted the motion to suppress, holding that Mandujano was a "putative defendant" when he appeared before the grand jury and that he was entitled to full *Miranda* warnings prior to testifying (Pet. App. D, pp. 36A-38A). The district court noted that although a grand jury subpoena is not inherently coercive, Mandujano was under an apparent compulsion to testify (Pet. App. D, p. 40A).

The Fifth Circuit Court of Appeals affirmed, adopting the holding of the district court (Pet. App. A, pp. 5A-6A, 12A). The Court of Appeals held that when Mandujano appeared before the grand jury the government had focused on him as a person whom the government knew had committed a crime and that the government intended to indict (Pet. App. A, p. 7A). The Court of Appeals found that the warnings given to Mandujano were inadequate (Pet. App. D, p. 30A). The court concluded that the entire proceedings violated Mandujano's due process rights under the Fifth Amendment (Pet. App. A, p. 19A) and were fundamentally unfair and that the remedy was suppression of the allegedly perjurious testimony. The government petitioned the Fifth Circuit Court of Appeals en banc and was denied unanimously.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is based upon the conclusions that: (1) the grand jury setting is inherently coercive and that a subpoena is coercive; albeit colorably lawful coercion, there is still compulsion; (2) That "putative defendants" must be given *Miranda* warnings either before testifying before a grand jury or at the instant the government asks specific questions of the witness, the answers to which the government already knows; and (3) That Mandujano was a "putative defendant" and that his testimony was properly suppressed. Our position is that the courts' decisions below are correct and we urge an affirmation of the holdings below.

1. A grand jury setting is coercive when one is forced to appear by subpoena. The subpoena itself may or may not be the coercive measure, but that considered with the grand jury makeup and the deprivation of one's normal freedoms act as an inherently coercive atmosphere. One does not have to be in unfamiliar surroundings nor does one have to be at a police station for coercion to exist. Coercion exists in many guises and can be physical and non-physical. The coercion of the police station that *Miranda* focused on is "functionally equivalent" to that of a grand jury setting. *Miranda* indicates that one does not have to be interrogated "in private" for coercion to exist. Consider that Mandujano was a tenth grade educated, ignorant Mexican who was emotionally and mentally "tricked and persuaded" by the special prosecutor. Mandujano was not an ordinary witness when he appeared before the inquisition and he was stripped of his Constitutional

rights by the cleverness of the prosecutor. Merely because Mandujano did not claim the privilege does not mean he was not compelled within the meaning of the Fifth Amendment.

Mandujano clearly did not knowingly waive any of his rights as the so-called warnings were so inadequate and confusing that Mandujano himself did not understand what the prosecutor was stating and therefore there was no relinquishment of any kind. The appearance of Mandujano was to place him in a compelling atmosphere in which he was deprived of his freedom and rights and thereby place him in a custodial atmosphere.

2. *Miranda* applies when an individual is in custody or deprived of his freedom in any significant way and is subjected to questioning which jeopardizes the Fifth Amendment right against compulsory self-incrimination. After the *Miranda* warnings are given and after the person has had an opportunity to exercise those rights, then and only then can an individual knowingly and intelligently waive those rights. When a person who is not under investigation is compelled to appear before the government's agent, the grand jury, then there is no requirement to administer *Miranda* warnings and thus there is no impairment of the grand jury's effectiveness. Furthermore, not every grand jury witness against whom the government has incriminating evidence at the time he is called to testify is a "putative defendant" nor are *Miranda* warnings required. The turning point is when the grand jury focuses, as they did on Mandujano, upon specific acts, at which time the grand jury should and indeed must advise the witness of his *Miranda* warnings and then the grand jury must afford the

individual the opportunity to exercise those rights so that an individual can knowingly and intelligently waive those rights.

Mandujano, with his tenth grade education, obviously did not knowingly and intelligently waive his rights, let alone understand them as is illustrated by the following questions asked by the grand jury prosecutor:

> "You are required to answer all the questions that I ask you except for the ones that would tend to incriminate you."

To which Mandujano replied:

> "Do I answer all the questions you ask?" (App. 5)

The same special prosecutor asked Mandujano in the same grand jury setting, "I take that to mean you do not wish the services of a lawyer here today?" To which Mandujano replied that he had talked to an attorney and that he could not afford one. (App. 6). This response caused the special prosecutor to state to Mandujano that the lawyer could not be inside the grand jury room but only outside.

Thus, the special prosecutor implied to Mandujano that it would do him no good to have an attorney with him anyway. Furthermore, it is very apparent that Mandujano did not understand the questions as to self-incrimination clearly, otherwise, why did Mandujano respond, "Do I answer all the questions you ask?"

Then the special prosecutor stated to Mandujano: "You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And of course, if you do not answer those truthfully, in other words, if you lie about

certain questions, you could possibly be charged with perjury. Do you understand that?" To which Mandujano replied, "Yes, sir." (App. 6). In light of Mandujano's already apparent lack of understanding from the previous question regarding incrimination, the question posed by the special prosecutor was not only long, but was couched in terms of ambiguity, so much so that the special prosecutor himself in the midst of his question had to rephrase what he thought as is exemplified by the interjection of "in other words".

Further, the word "possibly" created ambiguity and confusion to Mandujano because of the way in which it was used. The special prosecutor stated, " . . . You could 'possibly' be charged with perjury . . . ", which gives an ambiguous meaning that a wrong answer or a false utterance is not perjurious but might be. Because the "warning" given was confusing, not understood, and ambiguous, plus the possible threat that was involved to Mandujano, there is raised the question as to whether Mandujano may have been compelled in some significant way to testify by the form of the warning or deterred by it from invoking his privilege.

Further, the government continually presents the question phrased in many guises but limited to a question not raised by the Fifth Circuit's holding. The question asked by the government is whether a grand jury witness suspected of participating in the substantive offense must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination. The proper question should be: whether a "putative" defendant (someone not just suspected) who is compelled to appear before a grand jury must be advised of his Fifth Amendment right as well as to be advised of his *Miranda* warnings?

Mandujano was not merely suspected of participating in a substantive offense, he was already allegedly known to have done so as the government's Dale agents had informed the special prosecutor. The prosecutor states that "he did not consider the transaction to have been an indictable offense" (App. 42). The prosecutor stated that he did not intend to seek an indictment against Mandujano at that time (App. 42). The only intent on the part of the prosecutor was to ask the specific details surrounding the incident on March 29, 1973.

The government contends that there are additional related issues as to whether the "putative defendant" concept is to be deferred by reference to subjective criteria reflecting the prosecutor intent of government attorneys or objective criteria that consider whether the government possesses incriminating evidence against the witness at the time he is called to testify. *Miranda* answers the government's inquiry as to whether subjective criteria or objective criteria determines the status of a witness to be either an ordinary grand jury witness or that of a putative defendant. The test is whether the investigation was specific, focused on a specific violation of the law, and focused specifically upon the individual as the violator, an individual who is the focus of the investigation thereby removes himself from the role of an ordinary grand jury witness to that of the "putative defendant" who requires special warnings to be given before further questioning. What is to prevent the grand jury from subpoenaing and compelling everyone who was ultimately to be indicted to appear and testify about those specific matters about which he is ultimately indicted. Consider also the hypothetical regarding the case of a defendant, already

indicted, who is compelled by subpoena to appear before a grand jury. Is this individual entitled to any type of *Miranda* warning? Fifth Amendment advisement? Thus, Mandujano is clearly a "putative defendant" entitled to *Miranda* warnings.

3. As to the crucial point dealing with committing perjury with impunity, as would seem to be the end result of affirming the district court and court of appeals, there comes the question as to whether an agent of the prosecution, be it the grand jury or police, can compel a "putative defendant" to appear and testify against his Fifth Amendment right. Where a totally unfair procedure is used, such as that which occurred when Mandujano was compelled to appear before the government's tool, the grand jury, elemental fairness requires that the "putative defendant" be advised of his *Miranda* warnings and that failure to do so will result in suppressing the grand jury testimony. Consider the same result if the police fail to advise an accused before a confession is obtained. The test as stated by the courts below was based on *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1942) which stated that: "Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial." We contend that Mandujano was denied due process through the blatant misuse of the grand jury process.

ARGUMENT

The decision of the court of appeals is based upon the conclusions that: (1) a grand jury setting is coercive which compelled and overwhelmed the will of Mandujano; (2) that "putative defendants" must be given *Miranda* warnings either before testifying before a grand jury or at the instant the government asks specific questions of the witness, the answers to which the government already knows because they have already investigated the witness; and (3) that Mandujano was a "putative defendant" whose testimony was properly suppressed. We contend that the courts below were correct in each of their conclusions and affirmation of the decision must follow.

I.

A GRAND JURY SETTING IS INHERENTLY COERCIVE AS IT IS A PART OF THE INVESTIGATING PROCESS AND INTELLIGENCE SYSTEM OF THE GOVERNMENT.

A grand jury setting is inherently coercive, although in each and every instance, it may not be depending upon all the factors surrounding the grand jury, e.g., persons comprising grand jury, prosecutor, witnesses subpoenaed to appear, scope and purpose of investigation. In *United States v. Philips*, 443 F.2d 246, the Court stated that merely because questioning takes place in familiar surroundings rather than at a police station does not mean that a person is not being

subjected to custodial interrogation or is in an inherently coercive posture.

The grand jury in the case before the Court indicted Roy Mandujano on two counts. Count Two of the indictment alleges that: "... 2. That, at the time and place aforesaid, the grand jury, inquiring as aforesaid, was conducting an investigation to determine whether there were violations of the narcotics, internal revenue, or firearms laws of the United States. ..." (App. 2-3). There was only one time that the grand jury questioned Mandujano about persons from whom he had bought heroin (App. 17) and further, at the close of the interrogation there was discussion of a gun (App. 21-22). Nowhere else does the scope of the inquiry coincide with the purpose of what the grand jury's original setting was intended to investigate. Rather, the grand jury sat moot while the special prosecutor, E. Luckel, conducted his coercive questioning of Mandujano. The special prosecutor Luckel was not trying to determine whether there was any useful information to be had from Mandujano's appearance in the grand jury as was evident from the scope and focus of Luckel's questions.

Mandujano appeared pursuant to a subpoena before what was intended to be a peoples' panel designed to protect the innocent from unwarranted prosecution; but instead, Mandujano appeared before the special prosecutor and grant jury members alone and without the presence of counsel. Mandujano was not permitted to ask questions nor could he take notes and thus was at the mercy of the special prosecutor.

The Fifth Amendment and grand jury were designed to protect persons against arbitrary and oppressive

governmental action. *United States v. Calandra*, 414 U.S. 338, 343. Consider what was perpetrated upon Mandujano. He was compelled by way of a subpoena (App. 5), asked questions, the answers to which the special prosecutor already knew (App. 38, 39, 40, 44) for the exclusive purpose of trapping an ignorant, tenth grade educated, Spanish-speaking Mexican, to either invoke his Fifth Amendment right, or to answer the questions truthfully and face subsequent indictment on the case in chief (and, in effect, be forced to abandon one's right to testify on Count One of the indictment), or to refuse to answer and face contempt charges, or to knowingly answer the questions falsely and face perjury charges. This is what the special prosecutor's options were that he could force upon Mandujano and the ignorance of Mandujano was used like a club in the hands of the special prosecutor.

The government in its brief (p. 24) cites *In Re Groban*, 352 U.S. 330, standing for the proposition that the grand jury is not a secret proceeding nor is it coercive because they have a viewpoint from all sections of the community and do not have any axes to grind. The government, with emphasis supplied, citing from *In Re Groban, supra*, stated, "It would be very difficult for officers of the State seriously to abuse or deceive a witness in the presence of the grand jury". Consider the occasion wherein Mandujano was already investigated, was subpoenaed to appear before the grand jury and forced, coerced by the special prosecutor, to answer questions to which the prosecutor already knew the answers. The grand jury did not know that there was an investigation already done on Mandujano. Consider that the prosecutor need not present any evidence or

testimony that is exculpatory for Mandujano. Consider that subpoenas can be issued for irrelevant purposes which only conceal the true purpose of an investigation. Consider that the prosecutor does not have to inform the grand jury what an investigation is about or why he wants a particular witness questioned. The government in its brief (p. 24) states that a transcript is made of the proceedings – but consider, that if a prosecutor makes a false or prejudicial statement to the grand jury while a witness or "suspect" is absent, the statement can be stricken and it will not necessarily show up in the final record. *CF. Mattox v. Carson,* 424 F.2d 202.

The court in *Schneckloth v. Bustamonte*, said, "In determining whether a defendant's will was overborne in a particular case, the court has assessed the totality of all the surrounding circumstances. . . ." 412 U.S. 218, 226-227. After considering all the circumstances this court must conclude in this case that there was an overwhelming compulsion over Mandujano's will which virtually stripped him of any rights.

The government attempts to distinguish questioning that occurs at a police station and questioning that occurs before a grand jury. The government, in its brief (p. 23), states that the court in *Miranda* was concerned about the danger of compulsion during police interrogation which was probable due to the principal fact that the interrogation occurs in private. 384 U.S. at 449. Privacy is "essential to prevent distraction and to deprive (a suspect) of any outside support" (id. at 455). The police may then "persuade, trick, or cajole (the suspect) out of exercising his constitutional rights" (Ibid). Our position is that what happened to Mandujano indicates that one does not have to be

interrogated in "private" in order to be coerced. Mandujano was without benefit of any outside support and was forced to appear before "fellow citizens" of his community. The prosecutor did not physically "persuade, trick, or cajole" Mandujano, but emotionally and mentally the prosecutor did "persuade, trick, or cajole" him. *Miranda* was never intended to create "a constitutional straight jacket" (*Miranda, Supra*, 384 U.S. at 467) to be applied to every form of official questioning. However, the words of the court in its holding do not limit *Miranda* to merely police questioning nor does the language exclude its applicability to grand jury proceedings (id. at 477-478):

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

The court permits "general, on-the-scene questioning" – the court does not permit questioning which is specific and which questioning is based on known answers. Furthermore, the court did not contemplate the situation of a person under oath. The most important aspect from the above quotation is that "in such situations the compelling atmosphere inherent in the process of in-custody interrogation is not 'necessarily' present." Not necessarily present, but could be present – just as what occurred when Mandujano appeared before the grand jury.

The police can interrogate an individual be he a suspect or otherwise; but when the focus of the investigation excludes all other candidates as the perpetrator of the crime, the police must render the *Miranda* warnings. *Miranda* applies when an individual is in custody or deprived of his freedom in any significant way and is subjected to questioning which jeopardizes the individual's Fifth Amendment right against compulsory self-incrimination. After *Miranda* warnings are given and after the person has had an opportunity to exercise those rights, then and only then can an individual knowingly and intelligently waive the rights. *Johnson v. Zerbst,* 304 U.S. 438.

Mandujano obviously did not knowingly and intelligently waive any of his rights as explained by the special prosecutor Luckel nor did Mandujano understand them as is illustrated by the excerpts from the grand jury testimony: (All questions propounded by Eb Luckel, the special prosecutor, and the answers given by Mandujano).

"Q. . . . You are here today because you have been served with a subpoena. When did you get that subpoena?

"A. Sir?

"Q. When did you receive the subpoena, the piece of paper that told you to be here?

"A. Oh, I think last week.

"Q. Early in the week?

"A. Last week, Yes, Sir . . . (App. 5)

x
x
x

"Q. . . . Now, you are *required* to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?

"A. Do I answer all the questions you ask? (App. 5)

x
x
x

"Q. . . . First, of all, Sir, where do you reside now?

"A. Well, I'm living with my uncle.

"Q. Where?

"A. With my uncle. (App. 6)

x
x
x

"Q. And where is that place?

"A. On Guadalupe Street.

"Q. What address, please?

"A. 2217 Guadalupe.

"Q. 2270?

"A. Yes, Sir. (App. 7 and 8)

x
x
x

"Q. Is he (Respondent's father) in the business of repairing refrigerators?

"A. No, Sir. He buys refrigerators from houses, you know, and we fix them and sell them. (App. 9)

x
x
x

"Q. Is it safe to say that you don't make over $60?

"A. No, not more than that.

"Q. You never make more than $60 a week?

"A. Yes, Sir. (App. 10).

x
x
x

"Q. Okay. And do you presently use heroin yourself?

"A. No, Sir. I'm not using anymore . . .

"Q. How long has it been since you shot up heroin?

"A. About three months or four months . . .

"Q. In other words, you haven't shot up in 1973?

"A. No, Sir, I have . . .

"Q. How recently?

"A. About one time a week. (App. 13).

"Q. Do you have a gun by any chance?

"A. No, Sir.

"Q. You don't own a gun?

"A. I own one, Yes, Sir. (App. 21)

The Court has always set rigid standards for proof of a knowing and voluntarily given waiver of one's Constitutional rights and the burden of showing this rests with the government, *Miranda v. Arizona*, 384 U.S. at 475.

The Court in *Miranda*, 384 U.S. at 468, made it clear that an adequate warning is a prerequisite to a finding of an intelligent waiver.

For those unaware of the privilege, the warning is needed to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogation's implications, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

Mandujano was compelled to appear in a strange environment, before a body of some 23 persons, under the auspices of a highly trained and skilled special prosecutor, who asked Mandujano questions which were ambiguous and confusing and not understood as is exhibited by the foregoing excerpts from the grand jury testimony.

The Court in *Kirby v. Illinois*, 406 U.S. 682, 689, stated the test to determine custody must be an objective one. The government states that something more than official interrogation must be shown (Petitioner's Brief, p. 31). In the case before the Court, there is more than just official interrogation: a quasi-defendant subpoenaed to appear before the grand jury and questioned specifically about those very acts which formed the basis of a subsequent indictment. Furthermore, the government states that the "government's mere knowledge or intention with regard to a particular individual, unaccompanied by any action or

procedure that treats him differently from other individuals with whom the government deals does not itself initiate criminal proceedings or result in 'custody' " (Petitioner's Brief, p. 31). The government has pointed out the general rule which does not apply to "virtual" or "putative" defendants or to "suspects"—before this Court there is a particular individual, Roy Mandujano, who was treated differently from all other individuals with whom the government normally deals with and it is exactly this difference which places him in a category outside the scope of the ordinary grand jury witness. When the interrogation of Mandujano became specific, and focused on a specific violation of the law, and focused specifically upon Mandujano as the violator, then the individual, who is the focus of the investigation and interrogation removes himself from the ordinary role of a grand jury witness to that of a virtual or putative defendant. Thus, a grand jury setting is inherently coercive. The Court in *Bumper v. State of North Carolina,* 88 S.Ct. 1788, said that "the situation is instinct with coercial—albeit colorably lawful coercion. However, where there is coercion there cannot be consent", Id. at 1792. Our position is that a grand jury setting is "functionally equivalent" to a police station and that, even though a person is compelled to appear before a grand jury by a subpoena, the subpoena constitutes a "lawful coercion" which removes consent and choice from a witness.

II.

MANDUJANO WAS A "PUTATIVE DEFENDANT" PRIOR TO HIS APPEARANCE BEFORE THE GRAND JURY OR DURING THE QUESTIONING BEFORE THE GRAND JURY WHEN THE QUESTIONING BECAME SPECIFIC AS TO KNOWN PRIOR ACTS OF MISCONDUCT.

The government states that they did not seek Mandujano's indictment (Petitioner's Brief, p. 40). The special prosecutor, Eb Luckel, stated that: "I had no idea that he (Respondent) would be indicted. I had no intent to present any indictment, to pursue an indictment, or in any other way to consider an indictment in regard to the negotiations or attempt to purchase heroin between Officer Cavalier and Mr. Mandujano" (App. 42). The special prosecutor said that he had not realized that the uncompleted transaction was an indictable offense (App. 44), and that he only learned that it was, when later reviewing a possible perjury indictment with another government attorney (App. 36).

The special prosecutor, Eb Luckel, testified during a pretrial hearing on August 28, 1972, that he handled all legal matters up through indictment and that he acted in that capacity from and including May 2, 1972, the date Mandujano appeared before the grand jury (App. 37), and June 13, 1973, the date the indictment was filed. The Special prosecutor stated he knew of Mandujano by way of Officer Cavalier, who attempted to make a case against Mandujano (App. 38). The special prosecutor further stated that he discussed

Mandujano's case with Officer Cavalier at least two weeks before Mandujano was compelled to appear before the grand jury (App. 38) and that he read a report of the transaction (App. 39), and that he was aware of all the facts contained in the report (App. 39). Furthermore, the special prosecutor stated that Mandujano was subpoenaed based upon his conversation with Agent Cavalier (App. 39) and based on the facts gathered by Officer Cavalier in reference to Mandujano's alleged attempt to purchase one ounce of heroin (App. 40). The special prosecutor stated that "he had no idea that he (Mandujano) would be indicted. I had no intent to present any indictment, to pursue an indictment, or in any other way to consider an indictment in regard to the negotiations or attempt to purchase heroin . . . (App. 42)." When the special prosecutor stated that "he had no intent to present any indictment", the special prosecutor may not have intended to seek an indictment on the attempted purchase of heroin but that he would after the respondent appeared before the grand jury, because Mandujano might make a wrong statement and be indicted for perjury or may admit to the attempt itself and be indicted. Because Mandujano was involved in an "unindictable offense" of attempted distribution of one ounce of heroin, the special prosecutor would have us believe that he "had no intent to present any indictment" (App. 42) against Mandujano. The special prosecutor may not have intended to indict Mandujano on the substantive offense at the time that the special prosecutor talked with the government's only witness of the attempt, Officer Cavalier, but that the special prosecutor did intend to indict respondent after he

appeared before the grand jury. This is the only logical sequel to the special prosecutor's own answers time and again that his interrogation of Mandujano before the grand jury was based solely on conversations that he had with Officer Cavalier prior to Mandujano's appearance before the grand jury. The special prosecutor's statement that the sole and exclusive reason that he asked respondent those questions to which he already knew the answers was "to gauge the truthfulness of the person's testimony (App. 45)". Right here the special prosecutor has admitted that his intent was to trap Mandujano into committing perjury. Consider, then, why did the special prosecutor, after he had asked Mandujano the question to which he already knew the answers, further ask Mandujano, "Are you sure of that?" (App. 16). Later, the special prosecutor stated: "Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?" (App. 19). The special prosecutor knew what he was doing. The proceeding was so inherently unfair that the special prosecutor did not even advise Mandujano about his right to recant as is provided for in 18 U.S.C. 1623(d). See *United States v. Lardieri*, 497 F.2d 317. The district court concluded that "it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants" (Pet. App. D, p. 29A). That is the only conclusion this Court can make. To find otherwise would result in widespread, blatant misuse of the grand jury system by the government. The government (Petitioner's Brief, p. 44) states that the test for determining whether an individual is a putative defendant is that as is espoused in *United States v. Fruchtman*, 282 F. Supp. 534, 536:

> [T]hat although the Government may not be seeking an indictment against a witness at the time he takes the stand, there may come a point in the proceeding when the situation changes to such an extent that the witness become 'virtually in the position of a defendant.'
>
> . . . This is the only logical meaning of the phrase 'virtually in the position of a defendant.' The word 'virtually' connotes an objective test. Thus the logical result is reached that a man's rights do not depend on the subjective intent of the prosecutor nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law.

The government adopts the district court's language in *Fruchtman*, supra, that the examination of a (defendant) would not have been conducted any differently if the witness had been a potential defendant. What this indicates is that the questions posed would be the same but that at the outset of the grand jury interrogation or at the instant the answers would focus upon questions involving an indictable offense, the witness must be afforded a declaration of his rights, to include the right that the Fifth Amendment affords.

The government further states that it is going to present a difficult task to determine who a "putative defendant" is. Just because something is difficult or presents an unwanted rule should not be the determining factor in adopting the rule of the virtual and putative defendant. The government could argue the same in having the police read a person's *Miranda* warnings. The government contends that if the attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness and fails to administer appropriate warnings, the witness is free to

commit perjury with impunity. A similar rule applies to the rendering of *Miranda* rights by a policeman to a criminal suspect–if not done, then suppression of evidence is the remedy. Just as it must be in this case before the Court.

The government presents a test which they feel would indicate who a "putative defendant" is (Petitioner's Brief, p. 46): "That is, it must be established both that the witness was in fact a target of the grand jury investigation whom the government attorney expected to be indicted *and* that the government possessed substantial evidence to support an indictment at the time the witness appeared to testify before the grand jury."

Mandujano was a "putative defendant" under the test advanced by the government in that the government's attorney, Luckel, expected to indict Mandujano and that there was sufficient evidence to support the indictment as is evidenced by the affirmation of the district court's sentence of Mandujano for the substantive offense in *United States v. Mandujano*, 499 F.2d 370.

The proposed test to determine who a "putative defendant" is is based on whom the government attorney expected to indict. It seems as if it does not matter if the government expects to indict the person or not. Assuming arguendo that the question before the Court is not whether the person subpoenaed is suspect or a putative defendant; rather, that the question is whether the government is able to subpoena a person to appear before the grand jury and ask him specific questions the answers to which the government already knows. It is immaterial then whether the government

intends to seek an indictment on the substantive offense. What is significant is that if the government asks questions, the answers to which are based upon facts and evidence which in themselves are basis for an indictment, then the government must render the proper warnings to the grand jury witness. The government could avoid asking the questions which surround the offense they already have evidence on or they could give the witness an opportunity to recant or they could render immunity to the witness, in which case the government still has an effective tool in the grand jury and is thereby unfettered in their investigations. Thus, the conclusion of the arguendo is that it makes no difference whether one is suspected of an offense or that there is evidence to indict the witness. What makes the difference is that when the prosecutor subpoenas a person on the pretext of conducting an investigation, then asks questions which relate to the gathered evidence, the answers to which the government already knows, then the witness is no longer an ordinary witness but a putative defendant and must be given his warnings before questioning him any further. The government is not impeded nor frustrated if they ask questions of the witness which questions are not connected with the offense on which they already have evidence to indict the witness on. Thus this Court, even if it decides that the putative defendant concept is not applicable, pertaining to a witness appearing before a grand jury, then the Court must find that in all instances wherein the prosecution asks questions of the witness, which questions are based upon an investigation of a criminal offense to which the prosecutor already has the answers and which evidence is sufficient

to indict and prosecute, then the witness is thereby removed from the status of an ordinary grand jury witness to that of a "putative defendant" and must be advised of his *Miranda* warnings. After he is advised fully of his rights and he understands them, if the witness perjures himself, then he can be indicted. Otherwise, the testimony must be suppressed. But when a suspect or a person who was about to be indicted is compelled to appear before a grand jury and is asked specific questions about the offense he is suspected of or is about to be indicted on, then he no longer is an ordinary grand jury witness and thus must be advised of his rights as is afforded an ordinary person who is a suspect in a criminal investigation. If the government attorney believes that there is even a remote possibility of prosecution, he must warn the grand jury witness that he might be prosecuted and that his testimony might be used against him and that he has a right not to incriminate himself. *In Re Kelly*, 350 F. Supp. 1198, 1200-1205. Therefore, Mandujano was a "putative defendant" when he appeared before the grand jury as the focus of the investigation was on him. The government already had all the evidence necessary to indict him. The compelling atmosphere of the grand jury setting was coercive and he was deprived of his freedom in significant ways.

III.

THAT MANDUJANO AS A PUTATIVE DEFENDANT MUST BE AFFORDED MIRANDA WARNINGS.

There is no doubt that the privilege against self-incrimination is available to a witness if the witness desires to invoke his Fifth Amendment right to refuse to answer incriminating questions. *Kastigan v. United States,* 406 U.S. 441; *United States v. Monia,* 317 U.S. 424; *Counselman v. Hitchcock,* 142 U.S. 547, 562; *Lefkowitz v. Turley,* 414 U.S. 70, 78; *Hoffman v. United States,* 341 U.S. 479, 486-487. The decision of *Miranda v. Arizona,* 304 U.S. 436, indicates that the government must also warn the witness who appears before the grand jury inquisition that it will indict or has already gained the information on the witness which the government asks specific questions upon which the crime is based and which the government already knows the answers to. *Miranda* is concerned with the fact that a person who is the focus of a criminal investigation has understood his rights including the right to refuse to answer questions before the police begin their interrogation. 384 U.S. at 444, 467-468. See also *Escobedo v. Illinois,* 378 U.S. 478, 485. If *Miranda* applies to a criminal suspect, then it must also extend to a criminal suspect who is compelled to appear before a grand jury. This Court has held that the privilege against self-incrimination is for the personal benefit of the witness only and does not extend beyond the sphere of the witness. *United States v. Murdock,* 284 U.S. 141, 148; *Hale v. Henkel,* 201 U.S. 43, 69; *Brown v. Walker,* 161 U.S. 591; *Rogers v.*

United States, 340 U.S. 367, 371. Since the privilege is for the restrictive scope of the witness, then the witness is thereby entitled to be advised of his rights, more so, if the witness is a criminal suspect. Confer, *United States v. Jones,* 342 F.2d 863. In *Jones,* supra, the District of Columbia Court of Appeals held that when a suspect was taken before a grand jury without his consent, any questions asked of him violate his privilege. 342 F.2d 863, 868.

Mandujano was admonished by the special prosecutor but the warnings, aside from the question of whether they were understood clearly, were far inferior to the *Miranda* requirements. The government prosecutor advised Mandujano: "You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury (App. 6)". This is inadequate to comply with *Miranda.* The government felt that in a companion case, *United States v. Rangel,* 496 F.2d 1059, that the "warning given the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. Because these factual circumstances raised a question whether Rangel may not in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege, Rangel's case does not squarely present the issue we are raising, and we are not petitioning in his case (Pet. p. 5, Note 2)". The government therefore admits that clear and

understandable warnings are required to be given to the putative defendant witness and since the warnings were inadequate the government concedes that suppression is the proper remedy, as demonstrated by the *Rangel* decision. Reconsidering the warnings given by the special prosecutor to Mandujano, there clearly exists an ambiguous meaning, which was not understood, plus the threat that was directed to Mandujano, there exists the same question, as in *Rangel*, as to whether Mandujano may have been compelled to testify by the form of the warning or deterred by it from invoking his privilege. The government's concession that a witness in the status of a "putative defendant" must be adequately advised of his rights indicates that *Miranda* applies to a witness who is a criminal suspect, who if he is subpoenaed to testify before a grand jury, must be advised of his rights before he is questioned about the specific details of the offense which he is suspected of committing and which offense the government has evidence to indict already. *United States v. Luxenburg*, 374 F.2d 241; *United States v. Fruchtman*, 282 F. Supp. 534; *United States v. Digrazia*, 213 F. Supp. 232; *Lawn v. United States*, 115 F. Supp. 674. What the government has perpetrated against Mandujano clearly smacks against what the Court enumerated in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, which includes an unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury, or contempt and a sense of fair play. The American Bar Association in their Standards Relating to the Prosecution Function recommends:

> "If the prosecutor believes that a witness is a potential defendant he should not seek to compel

> his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advise concerning his right."

This Court in *Miranda*, 384 U.S. at 468-469, said that:

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation, a warning is a clear cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."

Thus, any witness who is compelled to appear before a grand jury and is asked questions to which the prosecution knows the answers and which is the basis of the alleged criminal act, must be given clear and understandable *Miranda* warnings. Furthermore, a witness who is in the status of a "putative defendant", that is the focus of the criminal investigation is specifically upon the witness as the violator of the law, then at the time the witness appears before the grand jury or when the interrogation before the grand jury becomes specific as to the criminal violations of the witness himself, then the witness must be advised of his *Miranda* warnings.

IV.

CAN A PUTATIVE DEFENDANT, WHO IS NOT GIVEN MIRANDA WARNINGS, COMMIT PERJURY WITH IMPUNITY?

As to this crucial point dealing with "perjury with impunity", as appears to be the end result in affirming the lower courts' decisions, there arises the question as to whether an agent of the prosecution, be it the grand jury or police, can compel a putative defendant to appear and testify against his Fifth Amendment right. The government relies on the traditional rule set out in *Glickstein v. United States*, 222 U.S. 139, 142, which simply postulates that "the immunity afforded by the constitutional guaranty relates to the past and does not endow the person who testifies with a license to commit perjury". See also *Harris v. New York*, 401 U.S. 222, 225; *Bryson v. United States*, 396 U.S. 64, 72. The petitioner contends that Mandujano committed a new criminal act, one that the Fifth Amendment gives no privilege.

These are the normal rules applicable to ordinary witnesses who appear before the grand jury. But the rule propounded under the philosophy of *Glickstein v. United States*, supra, hampers and destroys some of the protective purposes of the Fifth Amendment. The courts below based their decision on broader due process grounds than the restrictive logic that tears into the flesh of justice that the government proposes. There is no question as to the fact that the government knew that Mandujano had committed past criminal acts which were the basis of his indictment and his ultimate

conviction. However, if this Court will adopt the dictum of *Schneckloth v. Bustamonte*, infra, in looking to the "totality of the circumstances" in determining whether Mandujano's will was overborne, this Court will conclude that the entire proceeding was a farce and was a blatant denial of fundamental fairness as Mandujano had the "Hobson's Choice" (Pet. App. A, p. 15A) of the *Murphy v. Waterfront Commission*, trilemma of "self-accusation, perjury, or contempt", 378 U.S. 52, 55. The government assumes that Mandujano had the right to simply refuse to answer questions, but Mandujano's will was overwhelmed by the emotional stress and impact of being forced to appear before the grand jury, and he, being a victim of his own ignorance, was like putty being molded by the special prosecutor as the prosecutor was "primarily baiting respondent to commit perjury" (Pet. App. A., p. 11A). The government cites *United States v. Knox*, 396 U.S. 77, as the basis for holding that a defendant's perjury is unexcusable on Fifth Amendment grounds, However, in *Knox*, supra, the defendant filled out a form falsely and subsequently the forms were found to be wrong. But here, Mandujano was already investigated by the prosecution and then the prosecution subpoenaed Mandujano to appear before the grand jury under the highly questionable pretext of doing drug related investigations and then asked Mandujano the specific questions to which they already knew the answers. This Court in *Knox* held that the Fifth Amendment gives no privileges to perjurors (396 U.S. at 82). I submit that what the defendant Knox was subjected to was but a drop of water in the ocean as to what Mandujano was subjected to. Mandujano was grossly intimidated,

coerced, confused, ignorant, whose being there under those circumstances was a fundamental denial of due process. The coerciveness the government cites in *Cicenia v. Lagay*, 357 U.S. 504; *Brown v. Mississippi*, 297 U.S. 278; and *Gallegos v. Colorado*, 370 U.S. 49, demonstrates what is violative of due process requirements in that its compulsion of the mind by the atmosphere of the setting, the ignorance of Mandujano, and the purpose of having Mandujano there is coercion. The government assumes (Pet. Brief, p. 52) that coercion exists if there exists physical abuse (*Brown v. Mississippi*, supra), prolonged isolation in a hostile setting (*Gallegos v. Colorado*, supra), or extended and exhausting interrogation (*Watts v. Indiana*). Coercion exists in multitudinous forms and does not need to be physical brutality or extended interrogation or even prolonged isolation. In fact, the situation in the grand jury room was instinct with coercion.

The government further states incorrectly (Petitioner's Brief, p. 52) the holding of the lower courts when they state that the court of appeals' decision to be: "that it is inherently unfair to call as grand jury witnesses individuals known or suspected by the government to have some involvement in the kinds of criminal activity under investigation by the grand jury", Ibid. The basis of the court's decision and the question presented is whether the grand jury can subpoena individuals *known* by the government to have involvement in specific criminal conduct and whether it is a denial of due process for the prosecutor to ask specific questions of the known criminal activity to which the prosecutor knows the answers. The contention that the government had a far more plausible

motive for summoning Mandujano rather than to "entrap" him into self-incrimination or perjury is a shaky presumption. Consider then why didn't the special prosecutor avoid the subject matter already known, which was already the basis of an indictment? The special prosecutor himself tells us that he wanted to test the truthfulness of Mandujano's answers (App. 45). In other words, the special prosecutor wanted to catch Mandujano in a lie or inaccuracy to indict him for perjury.

The government throughout his brief fails to focus on the issue in Mandujano's case. The government cites *Kinsella v. United States ex. Rel. Singleton*, 361 U.S. 234 to stand for the proposition that the government's tactic was designed to "aid the grand jury in ascertaining whether a crime had been committed and if so by whom", which purpose is not shocking to the universal sense of justice or a violation of due process. In the *Kinsella* case, the government's tactic did exactly that. However, in this case, the government's tactic did not aid the grand jury in ascertaining whether a crime had been committed and by whom because the government already knew a crime had been committed and by whom because the government already knew that a crime had been committed and knew that Mandujano had done so, thus the *Kinsella* case, supra, is not applicable.

The Court of Appeals for the Fifth Circuit stated the proper test in *Betts v. Brady*, 316 U.S. 455, at 462: "Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of

justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial". CF. *Schneckloth v. Bustamonte*, 412 U.S. 218. If this Court concludes that there has been a usurpation of Mandujano's rights and a flagrant abuse of due process there is needed an appropriate remedy which is to suppress the alleged perjurious testimony in all cases where the government abuses the grand jury setting. The only remedy is suppression of the testimony in this case due to the denial of fundamental fairness and due process of Mandujano.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals be affirmed.

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THE STATE OF TEXAS)
AFFIDAVIT OF SERVICE
COUNTY OF HARRIS)

1. My name is Michael Allen Peters.

2. I am licensed to practice law in the State of Texas.

3. I am not licensed to practice before the Supreme Court of the United States.

4. I represent the Respondent, Roy Mandujano.

5. I certify that a true copy was mailed by certified mail, return receipt requested, postage prepaid, to the Solicitor General of the United States, Robert Bork, Department of Justice, Washington, D.C. 20530, on this the 5th day of August, 1975.

/s/Michael Allen Peters
Michael Allen Peters

SWORN TO AND SUBSCRIBED BEFORE ME this the 5th say of August, 1975, by Michael Allen Peters, in Houston, Harris County, Texas.

/s/Gretchen A. Hagstrom
Gretchen A. Hagstrom
Notary Public in and for
Harris County, Texas